No. A-949

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

KENAI PENINSULA BOROUGH,
Petitioner,

v.

STATE OF ALASKA,
Respondent.

REPLY OF KENAI PENINSULA BOROUGH TO ALASKA'S OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY TO OPPOSITION

Pursuant to Supreme Court Rule 24(4) the Kenai Peninsula Borough replies as follows to points raised in Alaska's opposition to the petitions for writ of certiorari. This reply pertains to matters not otherwise covered in the petition of the Kenai Peninsula Borough.

1. Legislative History.

Alaska claims that if this petition is granted an exhaustive review of the 1964 amendment to 16 USC § 715s will be required (Alaska Brief page 11). Alaska is in error. There is no ambiguity in 16 USC § 715s as amended in 1964. The statute unambiguously requires that 25% percent of the net proceeds from the sale of minerals from a wildlife refuge will be distributed to the county [borough] in which the refuge is located. Given the clarity of the language, the statute should be inter-

preted by application of the "plain meaning" rule, *Caminetti* v. *U.S.*, 242 U.S. 470 (1917). The Caminetti rule still applies today, *U.S.* v. *Clarke*, 100 S. Ct. 1127 (1980). Moreover, if the legislative history of the 1964 amendment to 16 USC § 715s is reviewed, nothing will be found to contradict the application of the "plain meaning" rule and nothing will be found to support the decision of the courts below.

2. Rules of Statutory Construction.

The State argues that the specific terms of other statutes require distribution of Kenai National Moose Range Revenues pursuant to the Mineral Leasing Act, 30 USC § 191. Specifically Alaska relies on Section 9(d), of the Alaska Native Claims Settlement Act, 43 USC § 1608(d) and the Alaska Statehood Act. Again the State is in error.

Section 9(d) of the Alaska Native Claims Settlement Act reads in part:

> "All bonuses, rentals, and royalties received by the United States after the date of enactment of this act from the distribution by it of such minerals in public lands in Alaska shall be distributed as provided in the Alaska Statehood Act . . ."

The Alaska Statehood Act does not require distribution of all receipts by the United States for mineral lands under 30 USC § 191. The Statehood Act only requires that if any mineral distribution is governed by the Mineral Leasing Act, the State will receive 90% of the revenues therefrom rather than 37½% as was the case of other states at the time of its enactment, Alaska Statehood Act § 28(b) (72 Stat. 339). Mineral distribution's from the Kenai National Moose Range are not governed by the Mineral Leasing Act.

Alaska's reliance on Section 317(a) of the Federal Land Policy and Management Act of 1976 (90 Stat. 2770) is misplaced. As in the case of the Alaska State-

hood Act the Land Policy Act merely requires that where the Mineral Leasing Act applies, Alaska will receive 90% of the mineral revenues rather than the increased amount of 50% in the case of other states. The Land Policy Act does not purport to establish a rule of allocation of revenues derived from the mineral receipts of wildlife refuges.

Lastly Alaska incorrectly relies on the doctrine of contemporaneous construction, *Udall* v. *Tallman*, 380 U.S. 1 (1965). In making this argument Alaska disregards the rule that an administrative official cannot by regulation or other interpretation alter an express statutory mandate, *Houghton* v. *Payne*, 194 U.S. 88, 99-100 (1904). Such a faulty interpretation by an administrator is a nullity *Dixon* v. *U.S.*, 381 U.S. 68, 74 (1965). This rule applies even where the faulty interpretation has prevailed over a period of years, *Enfield* v. *Kleppe*, 566 F. 2d 1139, 1142 (10th Cir. 1977). Thus, whatever errors the Secretary of Interior may have made in his administration of 16 USC § 715s prior to this litigation, those errors cannot establish a precedent in light of the clear statutory language to the contrary.

3. Alaska Native Claims Settlement Act.

Alaska argues that Section 9(d) of the Alaska Native Claims Settlement Act of 1971, 43 USC § 1608(d) requires that 2% of the gross mineral proceeds from public lands in Alaska is to be paid to the Alaska Native Fund. There will be no impact on the Alaska Native Fund if the Kenai Peninsula Borough prevails in this litigation. The funds subject to this petition involve revenues only from 1976 to the present date, not from 1972 to this date as the State argues. Moreover, no matter what the result may be in subsequent phases of this litigation if the petition is granted, the Alaska Native Fund will still receive the $500,000,000.00 maximum to which it is entitled, 43 USC § 1608(g).

Lastly, if in view of Alaska's argument, there is a serious question as to the severity of the impact of this litigation on the Alaska Native Fund, that is one additional reason why the petition should be granted. This Court should have the opportunity to review the merits, if indeed there are any, of the State's argument on this point.

4. Compact Under the Statehood Act.

Alaska argues that if the distribution of revenue from the Kenai National Moose Range is made pursuant to 16 USC § 715s, the compact between Alaska and the United States as set forth in the Alaska Statehood Act would be violated. The simple answer to that argument is that, as we have previously shown, the Alaska Statehood Act does not require that all mineral revenues be distributed pursuant to the Mineral Leasing Act, 30 USC § 191. It must follow that any argument that a compact between the United States and the State of Alaska has been violated is without merit.

We have shown that none of Alaska's reasons for denial of the Petition for Writ of Certiorari are valid. For that reason, as well as for the reasons stated in the petitions, those petitions should be granted.

Respectfully submitted this 28th day of August, 1980.

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Appendices

APPENDIX A

Title 16 United States Code

16 U.S.C. § 715s. Participation of States in revenues from National Wildlife Refuge System—Separate fund in United States Treasury; availability of funds until expended; definition of "National Wildlife Refuge System"

(a) Beginning with the next full fiscal year and for each fiscal year thereafter, all revenues received by the Secretary of the Interior from the sale or other disposition of animals, timber, hay, grass, or other products of the soil, minerals, shells, sand, or gravel, from other privileges, or from leases for public accommodations or facilities incidental to but not in conflict with the basic purposes for which those areas of the National Wildlife Refuge System were established, during each fiscal year in connection with the operation and management of those areas of the National Wildlife Refuge System that are solely or primarily administered by him, through the United States Fish and Wildlife Service, shall be covered into the United States Treasury and be reserved in a separate fund for disposition as hereafter prescribed. Amounts in the fund shall remain available until expended, and may be expended by the Secretary without further appropriation in the manner hereafter prescribed. The National Wildlife Refuge System (hereafter referred to as the "System") includes those lands and waters administered by the Secretary as wildlife refuges, lands acquired or reserved for the protection and conservation of fish and wildlife that are listed pursuant to section 1533 of this title as endangered species or threatened species, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any law, proclamation, Executive, or public land order.

Deduction of expenses

(b) The Secretary may pay from the fund any necessary expenses incurred by him in connection with the revenue-producing measures set forth in subsection (a) of this section.

Payments to counties

(c) The Secretary, at the end of each fiscal year, shall pay, out of the net receipts in the fund (after payment of necessary expenses) for such fiscal year, which funds shall be expended solely for the benefit of public schools and roads as follows:

(1) to each county in which reserved public lands in an area of the System are situated, an amount equal to 25 per centum of the net receipts collected by the Secretary from such reserved public lands in that particular area of the System: *Provided*, That when any such area is situated in more than one county the distributive share to each county from the aforesaid receipts shall be proportional to its acreage of such public lands therein; and

(2) to each county in which areas in the System are situated that have been acquired in fee by the United States, either (A) three-fourths of 1 per cenutum of the cost of the areas, exclusive of any improvements to such areas made subsequent to Federal acquisition, such cost to be adjusted to represent current values as determined by the Secretary for the first full fiscal year after enactment of this Act and as redetermined by him at five-year intervals thereafter, or (B) 25 per centum of the net receipts collected by the Secretary from such acquired lands in that particular area of the System within such counties, whichever is greater. The determinations by the Secretary under this subsection shall be accomplished in such manner as he shall

consider to be equitable and in the public interest, and his determinations hereunder shall be final and conclusive.

Limitation on amount; reduction of payments

(d) The payments under subsection (c) of this section to the counties in the United States for any one fiscal year shall not exceed the amount of net receipts in the fund for that fiscal year and, in case the net receipts are insufficient for a particular fiscal year to pay the aggregate amount of the payments for that fiscal year to the counties, the payment to each county shall be reduced proportionately.

Uses for surplus moneys

(e) Any moneys remaining in the fund after all payments are made for any fiscal year may be used by the Secretary thereafter for management of the System, including but not limited to the construction, improvement, repair, and alteration of buildings, roads, and other facilities, and for enforcement of the Migratory Bird Treaty Act, as amended.

Terms, conditions, and regulations for disposition of surplus products, grant of privileges, and execution of other activities resulting in collection of revenues

(f) The disposition or sale of surplus animals, minerals, and other products, the grant of privileges, and the carrying out of any other activities that result in the collection of revenues within any areas of the System may be accomplished upon such terms, conditions, or regulations, including sale in the open markets, as the Secretary shall determine to be in the best interest of the United States. Further, the Secretary may dispose of such surplus animals by exchange of the same or other kinds, gift or loan to public institutions for exhibition or propagation purposes and for the advancement of

knowledge and the dissemination of information relating to the conservation of wildlife in accordance with such regulations as he may prescribe.

Supersedure and repeal of other provisions

(g) Beginning with the first day of the next full fiscal year hereafter, the provisions of this Act shall supersede and repeal the provisions of the paragraph entitled "Management of National Wildlife Refuges" in the General Appropriation Act, 1951, approved September 6, 1950 (64 Stat. 595, 693-694).

June 15, 1935, c. 261, Title IV, § 401, 49 Stat. 383; 1939 Reorg.Plan No. II, § 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; 1940 Reorg.Plan No. III, § 3, eff. June 30, 1940, 5 F.R. 2108, 54 Stat. 1232; Oct. 31, 1951, c. 654, § 2(13), 65 Stat. 707; Aug. 30, 1964, Pub.L. 88-523, 78 Stat. 701; Oct. 15, 1966, Pub.L. 89-669, § 8(b), 80 Stat. 930; Dec. 28, 1973, Pub.L. 93-205, § 13(b), 87 Stat. 902.

16 U.S.C. § 715s (1974 and 1976 amendments). Participation of local government in revenue from areas administered by the United States Fish and Wildlife Service—Separate fund in United States Treasury; availability of funds until expended; definition of "National Wildlife Refuge System"

(a) Beginning with the next full fiscal year and for each fiscal year thereafter, all revenues received by the Secretary of the Interior from the sale or other disposition of animals, salmonoid carcasses, timber, hay, grass, or other products of the soil, minerals, shells, sand, or gravel, from other privileges, or from leases for public accommodations or facilities incidental to but not in conflict with the basic purposes for which those areas of the National Wildlife Refuge System were established, during each fiscal year in connection with the operation

and management of those areas of the National Wildlife Refuge System, National Fish Hatcheries, or other areas, that are solely or primarily administered by him, through the United States Fish and Wildlife Service, shall be covered into the United States Treasury and be reserved in a separate fund for disposition as hereafter prescribed. Amounts in the fund shall remain available until expended, and may be expended by the Secretary without further appropriation in the manner hereafter prescribed. The National Wildlife Refuge System (hereafter referred to as the "System") includes those lands and waters administered by the Secretary as wildlife refuges, lands acquired or reserved for the protection and conservation of fish and wildlife that are listed pursuant to section 1533 of this title as endangered species or threatened species, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any law, proclamation, Executive, or public land order.

Deduction of expenses

(b) The Secretary may pay from the fund any necessary expenses incurred by him in connection with the revenue-producing and revenue-sharing measures of this section.

Payments to counties

(c) (1) The Secretary shall pay out of the fund, for each fiscal year beginning with the fiscal year ending September 30, 1979, to each county in which is situated any fee area whichever of the following amounts is greater:

(A) An amount equal to the product of 75 cents multiplied by the total acreage of that portion of the fee area which is located within such county.

(B) An amount equal to three-fourths of 1 per centum of the fair market value, as determined by

the Secretary, of that portion of the fee area (excluding any improvements thereto made after the date of Federal acquisition) which is located within such county.

(C) An amount equal to 25 per centum of the net receipts collected by the Secretary in connection with the operation and management of such fee area during such fiscal year; but if a fee area is located in two or more counties, the amount of each such county is entitled to shall be the amount which bears to such 25 per centum the same ratio as that portion of the fee area acreage which is within such county bears to the total acreage of such fee area.

(2) At the end of each fiscal year the Secretary shall pay out of the fund for such fiscal year to each county in which any reserve area is situated, an amount equal to 25 per centum of the net receipts collected by the Secretary in connection with the operation and management of such area during such fiscal year: *Provided,* That when any such area is situated in more than one county the distributive share to each county from the aforesaid receipts shall be proportional to its acreage of such reserve area.

(3) For purposes of this section, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands shall each be treated as a county.

(4) (A) For purposes of determining the fair market value of fee areas under paragraph (1) (B), the Secretary shall—

(i) appraise before September 30, 1979, all fee areas for which payments under this section were not authorized for fiscal years occurring before October 1, 1977; and

(ii) appraise all other fee areas, within five years after October 17, 1978, in the order in which such areas were first established by the Service.

After initial appraisal under clause (i) or (ii), each fee area shall thereafter be reappraised by the Secretary at least once during each five-year period occurring after the date of the initial appraisal. Until any fee area referred to in clause (ii) is initially appraised under this subparagraph, the fair market value of such area shall be deemed to be that adjusted cost of the area which was used to determine payments under this subsection for fiscal year 1977; and in no case may the amount of any payment to any local government under paragraph (1) (B) with respect to any fee area be less than the amount paid under paragraph (2) (A) of this subsection (as in effect on September 30, 1977) with respect to such area.

(B) The Secretary shall make the determinations required under this subsection in such manner as the Secretary considers to be equitable and in the public interest. All such determinations shall be final and conclusive.

(5) (A) Each county which receives payments under paragraphs (1) and (2) with respect to any fee area or reserve area shall distribute, under guidelines established by the Secretary, such payments on a proportional basis to those units of local government (including, but not limited to, school districts and the county itself in appropriate cases) which have incurred the loss or reduction of real property tax revenues by reason of the existence of such area. In any case in which a unit of local government other than the county acts as the collecting and distributing agency for real property taxes, the payments under paragraphs (1) and (2) shall be made to such other unit which shall distribute the payments in accordance with the guidelines.

(B) The Secretary may prescribe regulations under which payments under this paragraph may be made to

units of local government in cases in which subparagraph (A) will not effect the purposes of this paragraph.

(C) Payments received by units of local government under this subsection may be used by such units for any governmental purpose.

Authorization of appropriations equal to difference between amount of net receipts and aggregate amount of required payments

(d) If the net receipts in the fund which are attributable to revenue collections for any fiscal year do not equal the aggregate amount of payments required to be made for such fiscal year under subsection (c) of this section to counties, there are authorized to be appropriated to the fund an amount equal to the difference between the total amount of net receipts and such aggregate amount of payments.

Transfer and use of excess of net receipts over aggregate amount of required payments

(e) If the net receipts in the fund which are attributable to revenue collections for any fiscal year exceed the aggregate amount of payments required to be made for such fiscal year under subsection (c) of this section to counties, the amount of such excess shall be transferred to the Migratory Bird Conservation Fund for use in the acquisition of suitable areas for migratory bird refuges under the provisions of the Migratory Bird Conservation Act.

Terms, conditions and regulations for execution of revenue producing activities; disposal of animals

(f) The Secretary shall carry out any revenue producing activity referred to in subsection (a) (1), (2), and (3) of this section within any fee area or reserve

area subject to such terms, conditions, or regulations, including sales in the open markets, as the Secretary determines to be in the best interest of the United States. The Secretary may, in accordance with such regulations as the Secretary may prescribe, dispose of animals which are surplus as any such area by exchange of the same or other kinds, gift or loan to public institutions for exhibition or propogation purposes, and for the advancement of knowledge and the dissemination of information relating to the conservation of wildlife.

Definitions

(g) As used in this section—

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "fee area" means any area which was acquired in fee by the United States and is administered, either solely or primarily, by the Secretary through the Service.

(3) The term "reserve area" means any area of land withdrawn from the public domain and administered, either solely or primarily, by the Secretary through the Service.

(4) The term "Service" means the United States Fish and Wildlife Service.

(5) The term "county" means any county, parish, or organized or unorganized borough.

Administration of payments to local governments for entitlement lands; reserved areas as entitlement lands; payments as payments under specified provisions

(h) In administering sections 1601 and 1607 of Title 31, for fiscal years occurring after September 30, 1978—

(1) reserve areas shall be deemed to be entitlement lands for purposes of section 1606(a) of Title 31; and

(2) payments received by any unit of local government pursuant to subsection (c)(2) of this section shall be deemed to be payments under a provision of law specified in section 1604 of Title 31.

As amended Dec. 3, 1974, Pub. L. 93-509, § 4, 88 Stat. 1603; Oct. 17, 1978, Pub. L. 95-469, § 1(a), 92 Stat. 1319.

APPENDIX B

Title 30 United States Code

30 U.S.C. § 181. Lands subject to disposition; persons entitled to benefits; reciprocal privileges; helium rights reserved

Deposits of coal, phosphate, sodium, potassium, oil, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this chapter to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this chapter.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands leased or otherwise granted under the provisions of this chapter, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas pro-

duced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof.

Feb. 25, 1920, c. 85, § 1, 41 Stat. 437; Feb. 7, 1927, c. 66, § 5, 44 Stat. 1058; Aug. 8, 1946, c. 916, § 1, 60 Stat. 950; Sept. 2, 1960, Pub. L. 86-705, § 7(a), 74 Stat. 790.

APPENDIX C

Title 30 United States Code

30 U.S.C. § 191. Disposition of moneys received

All money received from sales, bonuses, royalties, and rentals of public lands under the provisions of this chapter shall be paid into the Treasury of the United States; 37½ per centum thereof shall be paid by the Secretary of the Treasury as soon as practicable after December 31 and June 30 of each year to the State within the boundaries of which the leased lands or deposits are or were located; said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct; and, excepting those from Alaska, 52½ per centum thereof shall be paid into, reserved and appropriated, as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902, and of those from Alaska 52½ per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof: *Provided*, That all moneys which may accrue to the United States under the provisions of this chapter from lands within the naval petroleum reserves shall be deposited in the Treasury as "miscellaneous receipts", as provided by the Act of June 4, 1920 (41 Stat. 813), as amended June 30, 1938 (52 Stat. 1252). All moneys received under the provisions of this chapter not otherwise disposed of by this section shall be credited to miscellaneous receipts.

Feb. 25, 1920, c. 85, § 35, 41 Stat. 450; May 27, 1947, c. 83, 61 Stat. 119; Aug. 3, 1950, c. 527, 64 Stat. 402; July 10, 1957, Pub. L. 85-88, § 2, 71 Stat. 282; July 7, 1958, Pub. L. 85-508, §§ 6(k), 28(b), 72 Stat. 343, 351.

30 U.S.C. § 191. Disposition of moneys received (1976 Amendments)

All money received from sales, bonuses, royalties, and rentals of the public lands under the provisions of this chapter and the Geothermal Steam Act of 1970, notwithstanding the provisions of section 20 thereof, shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury as soon as practicable after March 31 and September 30 of each year to the State other than Alaska within the boundaries of which the leased lands or deposits are or were located; said moneys paid to any of such States on or after January 1, 1976, to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service; and excepting those from Alaska, 40 per centum thereof shall be paid into, reserved, appropriated, as part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902, and of those from Alaska as soon as practicable after March 31 and September 30 of each year, 90 per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof; *Provided*, That all moneys which may accrue to the United States under the provisions of this chapter and the Geothermal Steam Act of 1970 from lands within the naval petroleum reserves shall be deposited in the Treasury as "miscellaneous receipts", as provided by the Act of June 4, 1920 (41 Stat. 813), as amended June 30, 1938 (52 Stat. 1252). All moneys received under the provisions of this chapter and the Geothermal Steam Act of 1970 not otherwise disposed

of by this section shall be credited to miscellaneous receipts.

As amended Apr. 21, 1976, Pub. L. 94-273, § 6(2), 90 Stat. 377; Aug. 4, 1976, Pub. L. 94-377, § 9, 90 Stat. 1090; Sept. 28, 1976, Pub. L. 94-422, Title III, § 301, 90 Stat. 1323; Oct. 21, 1976, Pub. L. 94-579, Title III, § 317(a), 90 Stat. 2770.

APPENDIX D

Title 40 United States Code

43 U.S.C. § 1608(d).

All bonuses, rentals, and royalties received by the United States after December 18, 1971 from the disposition by it of such minerals in public lands in Alaska shall be distributed as provided in the Alaska Statehood Act, except that prior to calculating the shares of the State and the United States as set forth in such Act, (1) a royalty of 2 per centum upon the gross value of such minerals produced (as such gross value is determined for royalty purposes under the sale or lease), and (2) 2 per centum of all rentals and bonuses shall be deducted and paid into the Alaska Native Fund. The respective shares of the State and the United States shall be calculated on the remaining balance.

APPENDIX E

Title 43 United States Code

43 U.S.C. § 1608(g).

The payments required by this section shall continue only until a sum of $500,000,000.00 has been paid into the Alaska Native Fund less the total of advance payments paid into the Alaska Native Fund pursuant to section 407 of the Trans-Alaska Pipeline Authorization Act. Thereafter, payments which would otherwise go into the Alaska Native Fund will be made to the United States Treasury as reimbursement for the advance payments authorized by section 407 of the Trans-Alaskan Pipeline Authorization Act. The provisions of this section shall no longer apply, and the reservation required in patents under this section shall be of no further force and effect, after a total sum of $500,000,000.00 has been paid to the Alaska Native Fund and to the United States Treasury pursuant to this subsection.